Hastings Law Journal

Volume 29 | Issue 2 Article 7

1-1977

Sex Discrimination in Private Clubs

I. Lucretia Hollingsworth

Sex Discrimination in Private Clubs

The Scope of the Problem

I don't like my women for lunch. I like them for dessert.

— Unidentified Member,
San Francisco Commercial Club[1]

In an era of increasing egalitarianism, the exclusion of women from private clubs remains anomalously pervasive. Private clubs appear in infinite variety and number;[2] the list is as long as there are groups of people with similar interests who associate in pursuit of that interest.[3] Clubs are organized on local, national, and international

1. Butler, *Ladies Day at a Men's Club,* S.F. Chronicle, Sept. 16, 1976, at 2, col. 1. The comment was made in response to a sit-in demonstration at the San Francisco Commercial Club sponsored by Women Organized for Employment in protest of the discriminatory policies of the club. Among the protestors were San Francisco Municipal Court Judge Ollie Marie-Victoire and San Francisco Supervisor Dorothy von Beroldingen. *Id.*

2. Professional organizations are not included within the scope of this Note. Recent cases indicate a trend to compel admission to professional societies or associations where membership affects one's employment. *See, e.g.,* Pinsker v. Pacific Coast Soc'y of Orthodontists, 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969); Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 170 A.2d 791 (1961); Blatt v. University of S. Cal., 5 Cal. App. 3d 935, 85 Cal. Rptr. 601 (1970); *see generally* Sloss & Becker, *The Organization Affected With a Public Interest and Its Members — Justice Tobriner's Contribution to Evolving Common Law Doctrine,* 29 HAST. L.J. 99 (1977). *But cf.* Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Int'l, 52 App. Div. 2d 906, 383 N.Y.S.2d 383 (1976) (*mem.*), *aff'g* 83 Misc. 2d 1075, 374 N.Y.S.2d 265 (1975) (membership may not be compelled in Kiwanis on grounds that it is a "commercial" club).

3. Inherent in such variety is the immediate problem of determining the boundaries of the word "private." The meaning varies when used in the legal context of the first amendment, the fourteenth amendment, or with respect to "club."

The first amendment meaning of "private" broadly refers to those relationships protected by the freedom of association. Conversely, the meaning of "private" in the fourteenth amendment context is more narrowly circumscribed and refers to conduct that is not significantly involved with the state. The meaning of "private" when used with "club" has been described as an association "which is purely social in purpose, or which has some single narrow purpose which benefits the selfish interests of its members, such as golf clubs, social clubs, swimming clubs, recreational clubs, etc., and which establishes *prior* congeniality with those already members as a test of membership eligibility." Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Int'l, 52 App. Div. 2d 906, 383 N.Y.S.2d at 387 (Shapiro, J., dissenting) (emphasis in original).

bases, and many have memberships numbering in the hundreds of thousands or in the millions.[4]

The extent to which such organizations are truly private is the critical variable. It is axiomatic that the essence of a private club is exclusivity in the choice of one's associates. It is essential that truly private clubs remain protected, however, those clubs that are in fact quasi-private require close analysis in order to balance more equitably the interest of women who are excluded and the interest in association of men who are included.

How ever clubs may be characterized, it remains constant that the impact of discrimination by private clubs upon women is both profound and immediate. It is a problem of serious dimension that is further complicated by its insidious nature: "Those 'sacred' men's bars and lunchrooms are the embodiment of a strong idea: that discrimination on the ground of sex is reasonable, even natural — not as harmful, somehow, as racial or religious bias."[5]

Exclusion is profoundly significant because private clubs are a part of American life that to some degree touches each community and each citizen. The denial to women of access to and participation in this part of our culture contributes significantly to the perpetuation of women's dependence and inferiority[6] because

4. As of April 30, 1977, there was a total membership in Rotary International of 770,000. Telephone interview with Col. Robert S. Norris, Secretary, San Rafael Rotary, Greenbrae, Cal., July 11, 1977. As of Dec. 1976, Kiwanis International had 286,545 members in over 7,000 chapters. Telephone interview with Kiwanis District Office, Oakland, Cal., July 11, 1977. In 1977 the Jaycee organization had 325,000 members and the International Association of Lions Clubs claimed a membership of 1,036,802. WORLD ALMANAC 334-47 (paperback ed. 1977).

Fraternal organizations are also well represented. As of 1977 there were 1,582,735 members of the Benevolent and Protective Orders of Elks, 1,478,672 members of the Loyal Order of Moose, and 850,000 members of the Fraternal Order of Eagles. *Id.*

From a fiscal point of view, the Jaycee organization had a total budget in 1974 of $3,639,000, $1,143,000 of which was furnished by the federal government. New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856, 858 (2d Cir. 1975).

Women are excluded from membership in Rotary, Kiwanis, Jaycees, Lions, Elks, Moose, and Eagles.

5. Harkins, *Sex and the City Council,* NEW YORK MAGAZINE, April 27, 1970 at 10. *See generally Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the Comm. on Education and Labor, Discrimination Against Women,* (pt. 2), 91st Cong., 2d Sess. 618 (1971) (remarks of Hon. Shirley Chisolm).

6. *See generally,* Karst, *"A Discrimination So Trivial": A Note on Law and the Symbolism of Women's Dependency,* 49 L.A.B. BULL. 499 (1974). Although the doctrine of "separate but equal" has long been discredited in other situations, Gilmore v. City of Montgomery, 417 U.S. 556, 568 (1974), it generally survives with acceptance and apparent lack of concern in the realm of private clubs. One example of the insidious nature of this type of discrimination is that "women's auxiliaries" apparently

> [i]nequality is harmful chiefly in its impact on the psyches of the disadvantaged. . . . [W]hat really matters about inequality is something that happens inside our heads: "The peculiar evil of a relative deprivation . . . is psychic or moral; it consists of an affront, it is immediately injurious insofar as resented or taken personally, and consequentially injurious insofar as demoralizing."[7]

The exclusion of women has a more immediate impact when membership in a private club offers not only enhanced social status but the opportunity to participate in the economic and civic affairs of the community.[8] The exclusion of women from private clubs that are centers of commercial and community activity is prevalent and stems from traditional male dominance in business and government. Because private clubs provide important sources of contact for businesspersons[9] and are considered by some to be training grounds for new

---

go unquestioned. The Jaycee organization, for example, has a large and well-established female counterpart, the Jaycettes.

Other second class treatment of women by private clubs is not unusual. In many clubs women are permitted use of club facilities only on specified days of the week or only during specified hours; in others women may use only designated stairways, elevators, and rooms. *See also* Bennett v. Dyer's Chop House, Inc., 350 F. Supp. 153 (N.D. Ohio 1972); *Club Bars Visit of Mrs. Fong*, L.A. Times, July 26, 1972, pt. IV, at 4, col. 1. One golf player-celebrity, Ms. Dinah Shore, commented on her access to semiprivate golf courses in Palm Springs, Cal.: "The good weekend starting times are reserved for the men. Women can't tee off before 2 p.m. on Saturday and noon on Sunday. They claim the men deserve early starting times because they work all week and the weekends are their only chance to play. Well, I work all week, too, and the weekends are my only chance to play, too." Glick, *Dinah*, L.A. Times, April 16, 1974, pt. III, at 1, col. 2.

7. Karst, *"A Discrimination So Trivial": A Note on Law and the Symbolism of Women's Dependency*, 49 L.A.B. BULL. 499, 502-03 (1974) (quoting Michelman, *The Supreme Court, 1968 Term — Forward: "On Protecting the Poor Through the Fourteenth Amendment,"* 83 HARV. L. REV. 7, 49 (1969)).

8. "Social clubs have long been part of the American way of life. Not only do they provide pleasant amenities for members, they are gathering places for the establishment . . . where respected and important members of the community come together both socially and professionally. Thus the opportunity to join such a club may be a necessity for continued success in employment or in other critical areas. Because social club discrimination on the basis of religion does not stop there, [it helps to foster] an attitude that spills over from the social sphere to business, the professions, politics, and many other areas of life. Thus, the drive against social club discrimination is not a matter of social climbing or even of ambition and the desire to get ahead. It is an integral part of the mounting pressure for true equality." DALE, THE CLOSED SOCIETY (American Jewish Committee pamphlet 1969), *quoted in* B. BABCOCK, A. FREEDMAN, E. NORTON, S. ROSS, SEX DISCRIMINATION AND THE LAW 1057 (1975).

9. Johnson, *Bias in the Country Club Set*, Washington Post, Mar. 8, 1970, at 1, col. 1. "They are places where important business is transacted, where key professional contacts are made. Those who are excluded are thus cut off from a large part of both the decision-making and economic process." *Id.*

leaders in the corporate and governmental spheres,[10] exclusion tends to impede women's achieving equal status in commercial and community activities. The exclusion of a segment of the population from such private clubs works to severely limit the economic mobility of that segment.[11]

This Note will examine the parameters of private club discrimination from the perspective of women. First, the constitutional framework in which the conflict between private clubs and sex discrimination arises will be analyzed. Second, current statutory approaches to resolution will be reviewed emphasizing emerging theories suggested

10. Domhoff, *Playgrounds of the Powerful: How the Fat Cats Keep in Touch*, PSYCHOLOGY TODAY, Aug. 1975, at 44, 47-48. Even the most fragmentary listing of the membership in one West Coast private club is eloquently persuasive on this issue. Members of the Bohemian Club hold positions, among many others, as the chairmen of the boards of Bechtel Corporation, Southern California Edison, Kaiser Industries, Continental Oil, Tenneco; the presidents of Wells Fargo Bank, Firestone, and Bank of America; and directors of ITT, Stanford Research Institute, Urban Coalition, Mobil Oil, Heinz, Morgan Guaranty Trust, Standard Oil of California, American Express, General Telephone and Electronics, and Southern Pacific. *Id.*

Although many private clubs have "understood" rules that talk of politics or business is forbidden and that the club's premises or facilities are not to be used for politics or business, "inevitably they are." *Clubs: The Ins and Outs*, NEWSWEEK, Jan. 10, 1977, at 18-19. The Cosmos Club in Washington, D.C., "prides itself on being the site of discussions that later develop into public policy. Scientists Vannevar Bush and James Bryan Conant used the club to discuss the historic Manhattan Project on nuclear weapons. Current members include Supreme Court Justice Harry Blackmun, Vice President Nelson Rockefeller and Attorney General Edward Levi." *Id.* at 19 (footnote omitted).

Two blocks from the White House is the Metropolitan Club with members from the political, legal, and social elite of the Capitol. "[T]here are a 'great many' Jewish members and 'several' blacks, according to a club official." *Id.* Women, however, are excluded: " 'As much as we love the girls,' says W. John Kenney, president of Washington's Metropolitan Club, 'we just don't have the lavatory facilities to take care of them and all the men who come in for lunch.' " *Id.*

Although members at the Bohemian Club's annual summer encampment in the Northern California redwoods are expressly forbidden to talk of politics, "the club's rich and powerful male members . . . reportedly do a little dealing as they share cocktails. In 1967, by some accounts, Ronald Reagan met fellow member Richard Nixon there and agreed not to challenge Nixon in the early Presidential primaries of 1968." *Id.* William Domhoff, University of California sociologist, has observed: "These carefree get-togethers . . . provide the cement that helps bind together many of the rulers of America so that they can shape and influence national and corporate policies." *Id.*

11. "Male lawyers, especially from Wall Street, are loathe to be quoted on this matter of private clubs, but one criminal lawyer explains: 'This is a clan matter between lawyers and other lawyers. The good old boys in the Wall Street firms are so concerned about their places of refreshment because they fear the possibility of women or outsiders becoming privy to their private deals . . . and deals are what it's all about.' " *Taming the Lions in the Street with Title VII*, JURIS DOCTOR, Sept. 1976, at 9.

by state case law. Third, alternative methods of remedial action will be surveyed.

The Constitutional Framework

Introduction

An allegation of unconstitutional sex discrimination made against a private club will face the defense that the club is private and thus protected by the freedom of association. Unless a club is truly private in every way, however, freedom of association will not protect it. Should the freedom of association defense fail, the challenger of constitutionality must satisfy the elements of the fourteenth amendment in which the threshold question is whether there is sufficient state action to justify its application. If the state action requirement is met, the challenger must show a denial of equal protection.

These requirements are so burdensome that a constitutional attack on the legality of sex discrimination in private clubs has slight potential for success. It is perhaps most indicative of the potential of any constitutional approach to sex discrimination in private clubs that no cases have survived the threshold state action requirement.

The Freedom of Association

> *At the heart of this case is a conflict between two profound claims of right. Plaintiff contends that he has a right to be evaluated in his application for membership as a person and not as a black person. Perceiving that Cornelius is attempting to storm the citadel, the Elks and Moose stand antler to antler in asserting a constitutional right to discriminate on the basis of race with regard to their membership decisions.*
>
> — *Blumenfeld, D. J.*[12]

The freedom of association is a pervasive theme in the private club–sex discrimination context. It properly serves to protect truly private associations from attack on constitutional or state statutory grounds.[13] In a free society it is the right of each citizen to associate

12. Cornelius v. Benevolent Protective Order of the Elks, 382 F. Supp. 1182, 1187 (D. Conn. 1974).

13. The first amendment is one source of the right of freedom of association that can be used as the constitutional basis for private clubs to discriminate. Other theoretical bases have been suggested for the origin of the freedom of association including the ninth amendment and traditional concepts of substantive due process. *See* Comment, *Association, Privacy and the Private Club: The Constitutional Conflict*, 5 HARV. C.R.-C.L. L. REV. 460, 465-66 (1970). The due process clause of the fourteenth amendment secures these freedoms from abridgement by the states. Gitlow v. New York, 268 U.S. 652, 666 (1925). The freedom of association has evolved from cases interpreting the first amendment; it is not a freedom expressly guaranteed

with whomever he or she wishes to relate in a close, personal, social, and continuing way.[14] This constitutional protection applies to genuinely private clubs and extends to include any close, personal group of intimates who have joined together, to the exclusion of others, for the sake of mutual association.

The scope of the freedom of association has evolved to include the freedom to associate exclusively:

> The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.[15]

Freedom of association may be restricted, however, if there are important countervailing interests.[16] The character and extent of any interference with the freedom of association must be weighed against the countervailing interests.

The Constitution, for example, does not give anyone an unrestricted right of choice of those with whom he or she is likely to come into daily contact.[17] Freedom of association will not support the ex-

---

by the Constitution. Its explicit recognition as a separate constitutionally protected freedom arose from the United States Supreme Court's decision in NAACP v. Alabama, 357 U.S. 449 (1958). In that case the state attempted to compel disclosure of membership lists of the NAACP by forcing it to turn over a list of its members in that state. The effect of such compulsion, the Court found, was to inhibit the exercise of first amendment freedoms, specifically, the right to join together for the purpose of self expression. The Court noted that the freedom to associate for the advancement of beliefs and ideas is "beyond debate." *Id.* at 460.

14. Bell v. Maryland, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring). *See generally* Sengstock & Sengstock, *Discrimination: A Constitutional Dilemma,* 9 WM. & MARY L. REV. 59, 116-25 (1967); Note, *Association, Privacy and the Private Club: The Constitutional Conflict,* 5 HARV. C.R.-C.L. L. REV. 460, 466 (1970).

15. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179-80 (1972) (Douglas, J., dissenting), *quoted with approval in* Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974).

16. *See* Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974). Although it has been suggested that first amendment freedoms are "absolute," this view has not been adopted by a majority of the Court. *See, e.g.,* Roth v. United States, 354 U.S. 476, 482-85 (1957); P. KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION 114-17 (1962). Accordingly, the exercise of first amendment rights may be subjected to reasonable regulation as to time, place, and manner of exercise. *See, e.g.,* Breard v. Alexandria, 341 U.S. 622, 642 (1951); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940); Note, *Public Rental to Discriminating Groups,* 44 GEO. WASH. L. REV. 239, 244-45 (1976). *See generally* Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations,* 111 U. PA. L. REV. 328, 337-39 (1963).

17. "Some forced associations are inevitable in an industrial society. One who

clusion of any segment of society from a public place such as a restaurant. The public nature of such a place demonstrates that the owner's interest in privacy is slight compared to the right of access to public places regardless of one's color or sex.[18] These situations are distinguishable from genuinely private associational relationships because of the radically different interests at issue.[19]

Although the freedom of association should act as a shield for genuinely private clubs, in those instances where a so-called private club is, in fact, quasi-private, courts should be more sensitive to the interests at issue. In a businessman's luncheon club, for example, the male's interest in excluding women for business reasons, as opposed to personal reasons, must be carefully scrutinized. In a club that permits members to bring in any nonfemale member of the public, especially when this occurs in a business setting, the members' interest in privacy and free association is abrogated because members have no control over one another's nonfemale guests.[20] The public nature of such a quasi-private club, like that of a restaurant, demonstrates that the males' interest in exclusive association is slight compared to the females' right of access to public places.

A valid freedom of association claim will serve as a complete defense to a private club's discriminatory conduct if there is no significant state involvement with the club.[21] If state action is shown, however, only conduct that is not violative of equal protection is protected by the freedom of association.[22] It is at the crucial point of examining equal protection that courts weigh the interests of those who are included against the interests of those who are excluded.

---

of necessity rides buses and street cars does not have the freedom that John Muir and Walt Whitman extolled." International Ass'n of Machinists v. Street, 367 U.S. 740, 775 (1961) (Douglas, J., concurring).

18. Bell v. Maryland, 378 U.S. 226, 286 (1964) (Goldberg, J., concurring). Justice Goldberg noted: "This is not a claim which significantly impinges upon personal associational interests. . . . The broad acceptance of the public in this and in other restaurants clearly demonstrates that the proprietor's interest in private or unrestricted association is slight. . . . The history and the purposes of the Fourteenth Amendment compel the conclusion that the right to be served in places of public accommodation regardless of color cannot constitutionally be subordinated to the proprietor's interest in discriminatorily refusing service." *Id.* at 313-15. *See also* [1964] U.S. CODE CONG. & AD. NEWS 2495.

19. The interests at stake in the context of sex discrimination have been described as those relating to "one's sense of individuality, independence and self-worth." Schwenk v. Boy Scouts of America, 275 Ore. 327, 551 P.2d 465, 474 (1976). *See also* Karst, *"A Discrimination So Trivial": A Note on Law and the Symbolism of Women's Dependency*, 49 L.A.B. BULL. 499 (1974).

20. See notes 143-47 & accompanying text *infra*.

21. *See* Gilmore v. City of Montgomery, 417 U.S. 556, 573-74 (1974).

22. *Id.* at 576.

The Fourteenth Amendment

> *I ask no favors for my sex. All I ask of our brethren is that they take their feet off our necks.*
>
> — *Sarah Grimke*[23]

By its terms, the mandate of the fourteenth amendment that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws"[24] is limited to acts of states.[25] As a result, purely private acts of discrimination are not within the ambit of the fourteenth amendment.[26] Accurate definition of state action and equal protection is needed in order precisely to determine the constitutional boundaries of the regulation of private conduct.

State Action Analysis

There is no general formulation of the amount of state involvement sufficient to find state action.[27] Although the United States

23. S. GRIMKE, LETTERS ON THE EQUALITY OF THE SEXES AND THE CONDITION OF WOMEN (addressed to Mary Parker, Pres. of the Boston Female Anti-Slavery Soc'y 10 (1838)), *quoted in* Elsen, Coogan & Ginsburg, *Men, Women, and the Constitution: The Equal Rights Amendment*, 10 COLUM. J.L. & SOC. PROB. 77, 99 (1974).

24. U.S. CONST. amend. XIV, § 1.

25. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-50 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171-79 (1972); Burton v. Wilmington Parking Auth., 365 U.S. 715, 723 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948); The Civil Rights Cases, 109 U.S. 3 (1883).

26. Some purely private acts of discrimination have been reached. *See, e.g.*, Griffin v. Breckenridge, 403 U.S. 88 (1971); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). In *Jones* the Supreme Court barred discrimination against blacks in the sale or rental of property by private persons and based its holding upon § 1982 of the Civil Rights Act of 1866. Similarly, § 1981 of the 1866 Act has been construed to reach private racial discrimination in the making and enforcing of contracts. Runyon v. McCrary, 427 U.S. 160 (1976). *But cf.* Cornelius v. Benevolent Protective Order of the Elks, 382 F. Supp. 1182 (D. Conn. 1972) (membership in private fraternal organization may not be secured by suit brought under § 1981).

In the area of sex discrimination, private discrimination has been reached in employment (Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e through 2000e-17 (1970 & Supp. V 1975)), housing (Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1970 & Supp. V 1975), and credit opportunity (Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691e (Supp. V 1977)). For an excellent discussion of the potential applicability of racial civil rights legislation to the problems of sex discrimination see Calhoun, *The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Sex Discrimination*, 61 MINN. L. REV. 313 (1977) [hereinafter cited as Calhoun].

27. "While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'state action,' on the other hand, frequently admits of no easy answer. 'Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.'" Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972) (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961)).

Supreme Court has delegated to lower courts the task of case by case analysis of state action,[28] the Court gradually has narrowed what may be fairly characterized to be state action.[29] Several theories that categorize circumstances in which state action may be found have been articulated and refined. Each theory has been advanced in private club litigation.

In 1946 the Court held that a private entity satisfied the state action requirement because it acted as the functional equivalent of the state.[30] The effectiveness of the theory, however, has been virtually obviated by the Court's decision in *Hudgens v. National Labor Relations Board.*[31] In *Hudgens,* union picketing within a large shopping center was prohibited by its owner. The NLRB, agreeing with the union, found that this prohibition unconstitutionally infringed upon freedom of speech.[32] On appeal, the United States Supreme Court rejected the contention that the shopping center was functionally equivalent to the state stating: "The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use."[33] An attempt to extend the public function theory of state action to private club situations would thus appear to be futile in light of *Hudgens.*[34]

28. Golden v. Biscayne Bay Yacht Club, 530 F.2d 16, 19 (5th Cir. 1976) (citing Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961)).

29. See notes 72-75 & accompanying text *infra.*

30. Marsh v. Alabama, 326 U.S. 501 (1946). This case involved an attempt to regulate distribution of religious literature within the borders of a company owned town. Although the town was privately owned, the Court found that it was the functional equivalent of any municipality and therefore was subject to the fourteenth amendment. *Id.*

31. 424 U.S. 507 (1976).

32. *Id.* at 509-10.

33. *Id.* at 519 (quoting Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972)). *Marsh,* however, was distinguished as a situation in which all of the attributes of a state municipality had been assumed by the private entity. Thus, the public function theory of state action remains viable in an extremely narrow factual context. 424 U.S. at 515-17.

34. In one action involving a municipal lease of bay bottom land underlying a private club's dock facilities, the plaintiff proceeded on a public function theory and sought to have the policy of racial and religious discrimination of the club declared unconstitutional. Although the district court found that the club did perform a public function by providing private dock space that would relieve overcrowded public docks, this argument was summarily dismissed by the Court of Appeals. Golden v. Biscayne Bay Yacht Club, 530 F.2d 16, 17 (5th Cir. 1976), *reversing* 370 F. Supp. 1038 (S.D. Fla. 1973). *But see* Smith v. Young Men's Christian Ass'n, 316 F. Supp. 899 (M.D. Ala. 1970), *aff'd as modified,* 462 F.2d 634 (5th Cir. 1972). In *Smith,* a statute allowed a nominally private organization to perform public functions in an effort to circumvent desegregation orders issued to the parks and recreation authorities of Montgomery, Alabama. 462 F.2d at 641-42. Because of the statutory nature of the state involvement, this decision probably remains valid. *See also* Korzenik v.

Nearly twenty years after the formulation of the public function doctrine, the Court advanced a new standard in *Burton v. Wilmington Parking Authority*.[35] *Burton* involved racial discrimination by a restaurant that leased space in a state owned and maintained building dedicated to public use. The rent helped to finance the construction of the building, and the restaurant received tax benefits as a lessee in a state building.[36] The Supreme Court concluded that this mutually advantageous or symbiotic relationship between the state and the private entity would satisfy the state action requirement.[37] The con-

Marrow, 401 F. Supp. 77 (S.D.N.Y. 1975), in which the women of Scarsdale, New York alleged that an organization known as The Town Club performed a public function because of the role it played in the town's electoral process.

35. 365 U.S. 715 (1961).

36. *Id.* at 719-20.

37. *Id.* at 725. This standard has been frequently relied upon in private club-state action analyses which focus upon financial assistance to the club in the form of tax benefits. *See, e.g.*, Falkenstein v. Oregon Dep't of Revenue, 350 F. Supp. 887 (D. Ore. 1972) (three-judge court), *appeal dismissed sub. nom.* Oregon State Elks Ass'n v. Falkenstein, 409 U.S. 1099 (1973); McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972) (three-judge court); Pitts v. Department of Revenue, 333 F. Supp. 662 (E.D. Wis. 1971) (three-judge court). The argument is simple: Tax exemption concessions are granted as a *quid pro quo* to the private club in return for its performance of services that are normally expected by the public and that otherwise would be the responsibility of the state. Brunson v. Rutherford Lodge No. 547, 128 N.J. Super. 66, 319 A.2d 80 (1974). In *Brunson*, taxpayers and citizens challenged the property tax exemption that had been granted to an Elks Club that applied a racially discriminatory membership policy. The court found that the tax exemption impermissibly involved the state in private racial discrimination: "In this State it has long been recognized that there is a symbiotic relationship between the State and the exempt organization and that the latter is relieved from the burden of taxation because it is practically performing a public work which the State would otherwise have to perform." *Id.* at 85-86, 319 A.2d at 91. The court found that the charitable and educational programs of the club were public works that the state would otherwise have had to perform. *Id.*

It has been suggested, however, that a definitional double standard currently used in judicial approaches to the state action analysis makes it easier for courts to find state action in cases involving racial discrimination than in those involving sex discrimination. Calhoun, *supra* note 26, at 338. This seems to be borne out by two recent circuit court decisions that have held that tax benefits to private organizations that discriminate against women do not constitute state action. New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856, 859 (2d Cir. 1975); Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees, 495 F.2d 883, 886-87 (10th Cir.), *cert. denied*, 419 U.S. 1026 (1974). Courts in both cases relied on Walz v. Tax Comm'n, 397 U.S. 664 (1970), a case that challenged a property tax exemption to religious organizations. The Supreme Court held that this action did not constitute government "sponsorship" because there was no nexus between the exemption and the establishment of religion. 397 U.S. at 675-76. The *Rochester* court concluded: "In the case at bar the exemption granted to the United States Jaycees would be even less subject to constitutional attack than would an exemption granted to a church, for in the [*Walz*] case the proscriptions of the First Amendment

tinued application of this theory is questionable, however, as a result of the Supreme Court's recent indications that the symbiosis test is limited to the facts in *Burton*.[38]

Recently, the Court has held that in the absence of a public function or a symbiotic relationship there must be a cause and effect relationship between the action of the state and a specific discriminatory activity on the part of the private entity.[39] This test was advanced by the Court in *Moose Lodge No. 107 v. Irvis*,[40] a case involving a private club and racial discrimination. A member of the Moose Lodge and his four guests were refused dining room service because a member of the party, Mr. Irvis, is black. Irvis sued in federal court[41] on the theory that state action could be found in the grant of a liquor license to the lodge. The Court concluded that there was neither a public function performed by the lodge nor was there a symbiotic relationship that existed between the state and the lodge.[42] After considering the relationship between the alleged state action and the discriminatory activity of the lodge, the Court found that there was no connection

expressly require the separation of church and state." 495 F.2d at 888. Thus, it would seem that to find state action in the form of tax benefits in a racial discrimination-private club case courts will continue to utilize the *Burton* analysis as the court did in *Brunson*. In cases of private club-sex discrimination, however, it appears that courts will apply the nexus requirement as was done in *New York City Jaycees* and *Rochester*.

38. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358 (1974). *See also* New York City Jaycees, Inc. v. United States Jaycees, 512 F.2d 856 (2d Cir. 1975) (tax benefits not equivalent of public functions and reliance upon that theory misplaced). The tax exempt status of private clubs under the 1976 Tax Reform Act is discussed at notes 160-67 & accompanying text *infra*. *But see* Braden v. University of Pittsburgh, 552 F.2d 948 (3d Cir. 1977), in which the Third Circuit construed *Jackson* as not completely overruling *Burton*: "The implication arising from such efforts at differentiation is not that *Burton* was supplanted by *Jackson*, but rather that *Burton* remained as a powerful precedent with which the Court had to contend." *Id.* at 957-58. In *Braden* the Third Circuit affirmed the trial court's finding that the issue of state action, for purposes of a Civil Rights Act discrimination in employment charge, could not be summarily dismissed. In that case the court found significant the Pennsylvania statutory scheme related to the university: "[I]t is hereby declared to be the purpose of this act to extend Commonwealth opportunities for higher education by establishing University of Pittsburgh as an *instrumentality* of the Commonwealth to serve as a *State-related* institution in the Commonwealth system of higher education." *Id.* at 959 (quoting PA. STAT. ANN., tit. 24, § 2510-202 (Purden Supp. 1976)) (emphasis supplied by court).

39. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

40. 407 U.S. 163 (1972).

41. Irvis v. Scott, 318 F. Supp. 1246 (M.D. Pa. 1970). Irvis simultaneously filed suit in state court on a different theory. See notes 132-47 & accompanying text *infra*.

42. 407 U.S. at 175.

between the state's grant of the license, its only link with the club, and the club's discriminatory membership policies.[43] Because the Pennsylvania liquor licensing statute was not intended to encourage discrimination, there was no state action involved.[44]

Two years after *Moose Lodge* the Supreme Court in *Jackson v. Metropolitan Edison Co.*[45] crystalized the nexus concept: "The inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[46] In *Jackson* the Court failed to find significant state action in the act of terminating service to a consumer by a privately owned utility. The Court used a seriatum approach as a means of considering each state action theory.[47] Because the state statute involved imposed no obligation upon the state to furnish utilities, the Court found that the utility performed no public function.[48] Further, the Court declined to extend the public function theory to businesses, such as utility companies, that are "affected with the public interest."[49] The Court concluded that there was no symbiotic relationship between the state and the utility by noting that the *Burton* decision has been limited to situations involving the lease of public property.[50] Finally, the Court held that no nexus existed between state and utility because there was no proof that the state intended either overtly or covertly to encourage the utility practice of service termination.[51]

43. *Id.* at 175-77.

44. *Id.* at 173. An example of a state liquor license statute that patently involved the state is found in Women's Liberation Union v. Israel, 379 F. Supp. 44 (D.R.I. 1974), *aff'd*, 512 F.2d 106 (1st Cir. 1975). In that case the Union sought a declaratory judgment that a state statute regulating the sale of alcoholic beverages was unconstitutional and violative of the fourteenth amendment. The statute subjected a class of liquor licensees to criminal sanction and disqualification from holding a license if they allowed any woman to drink beverages on the premises. For a discussion of current attempts to control discrimination in private clubs through use of state power to regulate liquor licensing see notes 175-76 & accompanying text *infra*.

45. 419 U.S. 345 (1974).

46. *Id.* at 351 (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)).

47. Justice Douglas dissented in *Jackson* because the seriatum analysis employed by the majority was insufficient. Instead, it should be the state action factors considered in the aggregate that control. 419 U.S. at 360 (Douglas, J., dissenting). For cases following the *Jackson* seriatum method see Magill v. Avonworth Baseball Conference, 516 F.2d 1328 (3d Cir. 1975); New York City Jaycees, Inc. v. United States Jaycees, 512 F.2d 856 (2d Cir. 1975). *But see* Weise v. Syracuse Univ., 522 F.2d 397, 407 n.12 (2d Cir. 1975); Rackin v. University of Pa., 386 F. Supp. 992 (E.D. Pa. 1974).

48. 419 U.S. at 352-53.

49. *Id.*

50. *Id.* at 357-58.

51. *Id.* at 357 n.17.

Recent cases involving private club–state action analyses indicate the formidable nature of the state action requirement. Cases from the second,[52] eighth,[53] and tenth[54] circuits involving the Junior Chamber of Commerce (Jaycees) organization and its practice of discriminating against women as members are illustrative.

The first case, *Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees*,[55] was an attempt by a local Jaycee chapter in Rochester, New York, to compel its reinstatement after its expulsion from the national organization because it admitted women as members. Members of the local alleged state action in the form of tax exemptions and federal grants.[56] They further claimed that they were being deprived of the opportunity to take part in the charitable work of the national organization, which received some federal funding.[57] The United States Court of Appeals for the Tenth Circuit found no merit to these allegations because it failed to find any nexus between the discriminatory membership policy and the alleged state action.[58] The court suggested that under a proper set of circumstances a sufficient nexus could be found, for example if a private club received state funds and distributed them in a discriminatory manner.[59]

The second case, *Junior Chamber of Commerce of Kansas City v. Missouri State Junior Chamber of Commerce*,[60] was an action brought by another local chapter to enjoin the cancellation of its contract with the national organization. Kansas City was to be the site of the Jaycee national convention honoring its Ten Outstanding Young Men.[61] One month after the contract for the convention was signed, making the agreement subject to the United States Jaycee's bylaws, the local Kansas City chapter amended its bylaws to admit women as members. Subsequently, the National Executive Committee cancelled the contract, giving as one of its reasons the granting of membership rights to women by the local.[62] The trial court found that significant state action was present because federal grants were utilized by the United States Jaycees to fund many of their national pro-

52. New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856 (2d Cir. 1975).

53. Junior Chamber of Commerce of Kansas City v. Missouri State Junior Chamber of Commerce, 508 F.2d 1031 (8th Cir. 1975).

54. Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees, 495 F.2d 883 (10th Cir.), *cert. denied*, 419 U.S. 1026 (1974).

55. *Id.*

56. *Id.* at 884.

57. *Id.*

58. *Id.* at 888.

59. *Id.*

60. 508 F.2d 1031 (8th Cir. 1974).

61. *Id.* at 1032.

62. *Id.*

grams.[63] The United States Court of Appeals for the Eighth Circuit, however, held that there was no state action and rested its decision on the fact that there was no nexus between the receipt of federal funds and the holding of the Jaycee Congress.[64] This court considered, as did the *Rochester* court before it, the circumstances that might coalesce to produce a nexus sufficient to show state action. Relying upon *Moose Lodge* and *Jackson* the court concluded that even a nexus between the administration of federal funds, with the attendant loss of opportunity for leadership training, and the exclusion of women would fall short of the requisite quantum of state action.[65]

The final case occurred two months after the *Kansas City* case. In *New York City Jaycees, Inc. v. United States Jaycees, Inc.*,[66] another local chapter sued its national organization to enjoin the revocation of its charter because it admitted women as members. The local charged that the national's receipt of federal funds and tax exemptions, and its performance of certain civic functions constituted sufficient state action to prohibit its discrimination against women as members.[67] The United States Court of Appeals for the Second Circuit disagreed and found that the Jaycees did not perform public functions,[68] that no *Burton* symbiosis existed,[69] and that there was no nexus between the funds and tax exemptions received and the membership policies of the organization.[70] In reasoning that is applicable to each Jaycee case, the Second Circuit concluded:

> In this case the requisite connection between government and the offending activity has not been shown. Plaintiff does not charge discrimination in the operation of federally funded Jaycee programs; indeed such a claim could not be supported since not only do women participate both in the selection of local recipients for funding and in the implementation of programs, but also the bene-

63. *Id.* The national programs include: "(1) Operation Threshold, an alcoholic rehabilitation and awareness program. (2) Project Mainstream, relating to aid to the disadvantaged. (3) Environmental program sponsored by H.E.W. (4) A venereal disease awareness program. (5) Criminal Justice program designed to assist inmates and ex-offenders." *Id.* at 1032 n.2.

64. *Id.* at 1033.

65. "It may well be that, in administering these federally financed programs, Jaycees in each local chapter are given an opportunity to develop and maintain leadership qualities which will be beneficial to them in business, and that women are now being deprived of the right to thus improve themselves. But, as heretofore stated, that is not the sufficiently 'close nexus' required by *Jackson* and *Moose Lodge*, to constitute state (governmental) action and thus fall within the ambit of the due process requirement of the fifth amendment." *Id.* (citations omitted).

66. 512 F.2d 856 (2d Cir. 1975).

67. *Id.* at 858.

68. *Id.* at 859-60.

69. *Id.* at 859.

70. *Id.*

> fits of all federally funded Jaycee programs are distributed without regard to sex or other impermissible discriminatory criteria. Plaintiff's constitutional challenge is addressed solely to the internal membership policies of the Jaycees; yet plaintiff has made no showing that the government is substantially, or even minimally, involved in the adoption or enforcement of these policies.[71]

The Jaycee cases illustrate that there must be some nexus between the state action, regardless of its form, and the specific discriminatory activity on the part of a private entity. Some relationship must be established between the funds received from the state and their use in a discriminatory manner.

The state action requirement is formidable when viewed in its entirety. The public function theory has been so narrowed by *Hudgens* that its current applicability is extremely limited.[72] The symbiotic relationship theory has similarily been restricted in application, specifically by the *Jackson* Court, which limited *Burton* to cases involving leases of public property.[73] The *Jackson* application of the seriatum analysis and the formulation of the nexus requirement indicate that these two elements are now indispensible parts of state action analysis.[74] Finally, the practical difficulties of surmounting the satisfaction of the state action requirement are well demonstrated by the Jaycee cases.[75] It appears that a constitutional attack upon sex discrimination in a private club based upon a theory of state action will succeed only in a very limited set of circumstances.

Equal Protection Analysis

The United States Supreme Court has relied upon an evolving series of tests to determine whether state action violates the equal protection clause. Historically, in the area of economic and social regulatory legislation, the Court has taken the view that equal protection will be denied only if classifications bear no reasonable relation to a legitimate state purpose.[76] The burden of proving this lack of reasonable relation is on the party challenging the regulation.[77] In other areas, the Court has determined that state action that discriminates against certain classes or that touches upon fundamental rights violates equal protection unless it is justified by a compelling state interest.[78]

71. *Id.* (footnotes omitted).

72. See notes 30-34 & accompanying text *supra.*

73. See notes 35-38 & accompanying text *supra.*

74. See notes 45-48 & accompanying text *supra.*

75. See notes 52-71 & accompanying text *supra.*

76. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973); Labine v. Vincent, 401 U.S. 532, 538-39 (1971).

77. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

78. *See* Frontiero v. Richardson, 411 U.S. 677, 688 (1973); Dunn v. Blumstein, 405 U.S. 331, 342 (1972); Loving v. Virginia, 388 U.S. 1 (1967).

The heavy burden of proving a compelling state interest rests with the party defending the regulation.[79]

Classifications based upon sex have not been regarded as suspect by a majority of the Court.[80] Accordingly, the great body of case law that treats the issue of sex discrimination and equal protection has been decided on the basis of the rational relationship test.[81] The Supreme Court recently articulated a third equal protection test that may be used in addressing gender-based classification.[82] Under this test, equal protection is violated unless the classification by gender serves important governmental objectives and is substantially related to the achievement of those objectives.[83]

The effect of this new intermediate test for equal protection is not likely to be felt in the area of sex discrimination in private clubs because the prerequisite for the application of a test for equal protection, state action, is rarely found in this context. To date, no case involving sex discrimination in private clubs has survived the threshold scrutiny for the presence of state action.[84]

It is illustrative, however, to speculate as to the effect of the intermediate test in a case in which the state action requirement is met. Assume, for example, that a national service organization takes a por-

79. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16 (1973).

80. *See* Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973).

81. *Compare* Hoyt v. Florida, 368 U.S. 57 (1961); Gruenwald v. Gardner, 390 F.2d 591 (2d Cir. 1968), *cert. denied sub nom.* Gruenwald v. Cohen, 393 U.S. 982 (1968) *and* Muller v. Oregon, 208 U.S. 412 (1908) *with* United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968); Karczewski v. Baltimore & O.R.R., 274 F. Supp. 169 (N.D. Ill. 1967); White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966).

82. Craig v. Boren, 429 U.S. 190 (1976). In *Craig* the Court determined that a state statute that prohibited the sale of 3.2% beer to males under the age of twenty-one and to females under the age of eighteen denied to eighteen-to-twenty year old males equal protection in violation of the fourteenth amendment. Justice Brennan delivered the opinion of the Court in which Justices Stewart and Blackmun concurred. Justice Powell concurred separately and reluctantly endorsed the intermediate standard for gender classification. Justice Stevens concurred in the opinion but rejected the "rational basis," "intermediate," and "compelling state interest" tests in favor of one standard. Chief Justice Burger dissented and rejected the placing of gender classifications into a "disfavored" category. Justice Rehnquist dissented on the grounds that gender classifications need only pass a "rational basis" test.

83. "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197.

84. In Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593 (S.D. N.Y. 1970), a public bar that was licensed by the state was found to violate the equal protection clause because of its policy of refusing to serve women. Although *Seidenberg* was decided two years before *Moose Lodge, Seidenberg* is distinguishable because the tavern was a public place.

tion of the federal funds that it receives and gives one half in scholarships to promising young men who plan careers in law and one half in scholarships to promising young women who plan careers in medicine. If this distribution is challenged the organization must show that these classifications serve important governmental interests and that they are substantially related to the achievement of those objectives. Although the service organization may argue that its activity is in furtherance of the important objective of higher education it cannot meet the requirement of the new test that the classification serve an important governmental objective. The gender-based classifications created in this hypothetical appear to serve no governmental interest because there are men who plan careers in medicine as well as in law and, conversely, women who plan careers in law as well as in medicine. Because it is the discriminatory distribution of state funds that is at issue here and because there is no apparent justification for the classifications created by the organizations, the distribution method could violate the equal protection clause of the fourteenth amendment.[85]

85. It is appropriate at this point to consider the equal rights amendment and its potential impact upon sex discrimination by private clubs. The proposed amendment provides:

1. Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. proposed amend. XXVII. It has been suggested that the similarity in language between this proposed amendment and the fourteenth amendment indicates that the two amendments would be construed similarly. Calhoun, *supra* note 26, at 324 n.55; *see* Elsen, Coogan & Ginsburg, *Men, Women, and the Constitution: The Equal Rights Amendment,* 10 COLUM. J.L. & SOC. PROB. 77 (1974). Like the fourteenth, however, the proposed amendment addresses state action alone. Accordingly, the equal rights amendment would afford little immediate relief to those who would attack private clubs on sex discrimination charges primarily because of the state action requirement.

Section two of the proposed amendment is perhaps the most significant provision for the issue of sex discrimination in private clubs. The power to legislate enforcement of the amendment would give Congress direct power to proscribe private acts of sex discrimination, an authority that is comparable to the present power of Congress to regulate private acts of racial discrimination. *See generally* Calhoun, *supra* note 26.

The equal rights amendment, in order to become a part of the Constitution, must be ratified by thirty-eight states by March, 1979. As of June 30, 1977, thirty-five states had approved the amendment. L.A. Times, June 30, 1977, at 2, col. 4.

For differing interpretations of the potential effects of the proposed amendment *compare* Elsen, Coogan & Ginsburg, *Men, Women, and the Constitution: The Equal Rights Amendment,* 10 COLUM. J.L. & SOC. PROB. 77 (1974) *and* Calhoun, *supra* note 26, *with* Freund, *The Equal Rights Amendment Is Not the Way,* 6 HARV. C.R.-C.L. L. REV. 234, 237-38 (1971) *and* Kurland, *The Equal Rights Amendment: Some Problems of Construction,* 6 HARV. C.R.-C.L. L. REV. 243 (1971).

Constitutional Summary

The doctrine of freedom of association will operate to shield a club that discrimates against women if the club is not significantly involved with the state. In cases in which a private club is significantly involved with the state, courts in balancing the freedom of association against equal protection should favor the latter. It has been shown, however, that in the context of private clubs the state action requirement, a prerequisite to the invocation of the equal protection test, is almost impossible to meet under present definitional constraints.[86]

Statutory Framework

In contrast to constitutional approaches, statutory schemes suggest potentially successful new theories for use in cases involving sex discrimination in private clubs.

Federal Legislation

Federal legislation prohibiting sex discrimination may be briefly summarized as prohibiting discrimination against women in the areas of employment,[87] housing,[88] credit opportunity,[89] and education.[90] With a few notable exceptions the mass of "resurrected nineteenth century civil rights statutes"[91] and the civil rights legislation emanating from the civil rights movement of the 1960's[92] is not applicable to discrimination based on sex. As a result there is no federal law that prohibits discrimination on the basis of sex in areas such as the sale of property, the right to enforce and make contracts, and the right of access to public accommodations.

The federal public accommodations law,[93] contained in the Civil

86. See notes 72-75 & accompanying text *supra*.

87. Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e through 2000e-17 (1970 & Supp. V 1975).

88. Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619, 3631 (1970 & Supp. V 1975).

89. Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691e (Supp. V 1977).

90. 20 U.S.C. § 1681 (Supp. V 1975). *See also id.* §§ 1701-1718, 1720-21.

91. Calhoun, *supra* note 26, at 315.

92. This legislation included the Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81, and the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

93. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. §§ 2000a through 2000a-6 (1970)). The Civil Rights Act of 1964 relied on the commerce clause and not the power of Congress to regulate under section 5 of the fourteenth amendment. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 270-71 (1964); Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333, 1340 (2d Cir. 1974); Miller v. Amusement Enterprises, Inc., 394 F.2d 342, 351-53 (5th Cir. 1968).

Rights Act of 1964,[94] includes a prototype exemption clause for private clubs.[95] This law does not prohibit sex discrimination but is nonetheless relevant because cases interpreting it have focused on delineating elements inherent in a truly private club. These elements have generally been adopted by state courts in cases involving private clubs that are brought on the basis of state statutes prohibiting sex discrimination in places of public accommodation.[96]

Prior to the passage of the Civil Rights Act of 1964, which provides that no person may be discriminated against on the basis of race, color, religion, or national origin in places of public accommodation,[97] there was no law in this country that prohibited racial discrimination in public places. Congress expressed concern that the Act's passage might infringe upon first amendment rights of association.[98] Congress questioned the constitutionality of legislation that did not limit this potential encroachment[99] and consequently exempted private clubs and establishments not open to the public from the Act's application.[100]

94. 42 U.S.C. §§ 1971(a),(c),(f)-(g), 1975a-1975d, 2000a through 2000a-6, 2000b through 2000b-3, 2000c, 2000c-2 through 2000c-9, 2000d through 2000d-4, 2000e through 2000e-17, 2000f, 2000g through 2000g-3, 2000h through 2000h-6 (1970 & Supp. V 1975).

95. 42 U.S.C. § 2000a(e) (1970).

96. *See, e.g.*, Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Int'l, 83 Misc. 2d 1075, 1077, 374 N.Y.S.2d 265, 267 (1975), *aff'd per curiam*, 52 App. Div. 2d 906, 383 N.Y.S.2d 383 (1976).

97. The Public Accommodations Law provides: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a (1970).

98. *See* H.R. REP. No. 914, pt. 2, 88th Cong., 1st Sess., at 9 (1963), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2495: "Moreover, where freedom of association might logically come into play as in cases of private organizations, title II quite properly exempts bona fide private clubs and other establishments."

99. *See, e.g.*, 110 CONG. REC. 2293 (1964) (remarks of Representative Long of Louisiana). Senator Humphrey responded: "Title II . . . is designed to reach the most significant manifestations of discrimination. It is carefully drafted and moderate in nature. There is no desire to regulate truly personal or private relationships. . . . This does not mean that discrimination in the operation of such facilities is any more defensible or moral than elsewhere, but merely that discrimination in such establishments is not of major dimension, especially when compared with the other problems with which title II and the bill as a whole deals." *Id.* at 6534. *See* [1964] U.S. CODE CONG. & AD. NEWS at 2495.

100. 42 U.S.C. § 2000a(e) (1970). The statute initially exempts any club that is truly private. There is, however, an exception to the exemption if any private club opens its facilities to the public. It is significant that in the decade since the passage of the Civil Rights Act case law has focused on the first phrase of the exception. There appears to have been no litigation involving the second phrase. Kramer, *Construction and Application of § 201(e) of the Civil Rights Act of 1964 (42 U.S.C. §*

This statute has been the primary focus of extensive litigation between blacks and private clubs throughout the country. Blacks challenging membership policies of the clubs assert that they are not in fact private, whereas clubs maintain that because members are joined together with close associational ties they retain the right to exclude whomever they please under the exemption. The federal decisions have focused on the definitional issue of what is a "private" club.

Cases interpreting the private club exemption clause have delineated certain criteria to be used in judicially determining whether a club is truly private: selectiveness in membership, membership control, use of the club's facilities, and individual considerations.

The more selective the membership is the more likely it is that the club is private.[101] In this regard a court will look to the measure of control that members play in the selection[102] and rejection of new members,[103] the existence of formal membership procedures,[104] the standard of qualifications for membership,[105] and the substantiality of membership dues.[106]

The more a club takes on the characteristics of a business the less likely it is that it will be found to be private.[107] This criterion also incorporates several factors including the ownership of club property[108]

2000a(e)), Excluding From the Act's Coverage Private Clubs and Other Establishments Not in Fact Open to the Public, 8 A.L.R. Fed. 634, 638 n.5 (1971).

101. *See* Nesmith v. YMCA, 397 F.2d 96, 102 (4th Cir. 1968); United States v. Johnson Lake, Inc., 312 F. Supp. 1376, 1378-79 (S.D. Ala. 1970); United States v. Jack Sabin's Private Club, 265 F. Supp. 90, 92-93 (E.D. La. 1967).

102. *See* United States v. Richberg, 398 F.2d 523, 527 (5th Cir. 1968); Bell v. Kenwood Golf and Country Club, Inc., 312 F. Supp. 753, 756, 758 (D. Md. 1970); Wright v. Cork Club, 315 F. Supp. 1143, 1147, 1151-52 (S.D. Tex. 1970).

103. *See* United States v. Johnson Lake Inc., 312 F. Supp. 1376, 1379 (S.D. Ala. 1970); Bell v. Kenwood Golf and Country Club, Inc., 312 F. Supp. 753, 756 (D. Md. 1970); Williams v. Rescue Fire Co., Inc., 254 F. Supp. 556, 561 (D. Md. 1966).

104. *See* Nesmith v. YMCA, 397 F.2d 96, 101 (4th Cir. 1968); Stout v. YMCA, 404 F.2d 687, 688 (5th Cir. 1968); Wright v. Cork Club, 315 F. Supp. 1143, 1151 (S.D. Tex. 1970).

105. *See* Nesmith v. YMCA, 397 F.2d 96, 101 (4th Cir. 1968); United States v. Richberg, 398 F.2d 523, 527 (5th Cir. 1968); Wright v. Cork Club, 315 F. Supp. 1143, 1151 (S.D. Tex. 1970).

106. *See* United States v. Richberg, 398 F.2d 523, 527 (5th Cir. 1968); United States v. Johnson Lake Inc., 312 F. Supp. 1376, 1379 (S.D. Ala. 1970); United States v. Jack Sabin's Private Club, 265 F. Supp. 90, 93 (E.D. La. 1967).

107. *See* Daniel v. Paul, 395 U.S. 298, 301 (1969); United States v. Jack Sabin's Private Club, 265 F. Supp. 90, 92-93 (E.D. La. 1967).

108. *See* Daniel v. Paul, 395 U.S. 298, 301 (1969); Bell v. Kenwood Golf and Country Club, Inc., 312 F. Supp. 753, 754, 758 (D. Md. 1970); United States v. Johnson Lake Inc., 312 F. Supp. 1376, 1378 (S.D. Ala. 1970).

and the extent that members, as opposed to outside managers, exercise direct control over spending of club revenues.[109]

For a club to be considered private a court will require a bond to exist among members that is stronger than mere patronage of the same facility.[110] In addition, if nonmembers are regularly admitted as guests without having to become members, the club is less likely to be considered truly private.[111]

Some courts have considered individual characteristics of clubs in determining the private status question. For example, in an instance in which a club was apparently formed in an effort to evade civil rights legislation several courts have considered the history of the organization.[112] In other cases the fact that the club advertised publicly was dispositive of the private status issue.[113]

These criteria are by no means fixed; the evolutionary process that began with the passage of the Civil Rights Act continues into the present. Courts consistently examine numerous variables in determining whether a club is private. Decisions in recent cases based on state public accommodation laws reveal that several important factors are emerging that are pertinent to a consideration of a club's status as private or public.

State Legislation

By 1977 twenty-one states[114] had enacted statutes prohibiting discrimination on the basis of sex in places of public accommodation. Typically these statutes are patterned after the federal public accom-

109. *See* United States v. Richberg, 398 F.2d 523, 527 (5th Cir. 1968); Wright v. Cork Club, 315 F. Supp. 1143, 1152 (S.D. Tex. 1970); United States v. Johnson Lake Inc., 312 F. Supp. 1376, 1379 (S.D. Ala. 1970); United States v. Jack Sabin's Private Club, 265 F. Supp. 90, 94 (E.D. La. 1967).

110. *See* Gillespie v. Lake Shore Golf Club, Inc., 56 Oh. Abs. 222, 91 N.E.2d 290 (Ohio, Ct. App. 1950).

111. *See* United States v. Northwest Louisiana Restaurant Club, 256 F. Supp. 151, 153 (W.D. La. 1966); Williams v. Rescue Fire Co., 254 F. Supp. 556, 561 (D. Md. 1966).

112. *See* United States v. Richberg, 398 F.2d 523, 529 (5th Cir. 1968); United States v. Jordan, 302 F. Supp. 370 (E.D. La. 1969); United States v. Northwest Louisiana Restaurant Club, 256 F. Supp. 151 (W.D. La. 1966).

113. *See* Daniel v. Paul, 395 U.S. 298, 304 (1969); United States v. YMCA, 310 F. Supp. 79, 80 (D.S.C. 1970). *But see* United States v. Jordan, 302 F. Supp. 370, 373 (E.D. La. 1969).

114. ALASKA STAT. § 18.80.230 (1974); CAL. CIV. CODE § 51 (West Supp. 1977); COLO. REV. STAT. § 24-34-501 (1973); CONN. GEN. STAT. ANN. § 53-35 (West Supp. 1977); DEL. CODE tit. 6, § 4504 (1974); FLA. STAT. ANN. § 509.101 (West 1977); IDAHO CODE § 67-5909 (1973); IOWA CODE ANN. § 601A.7(1)(a) (West 1975); KAN. STAT. § 44-1002 (Supp. 1976); LA. CONST. art. 1, § 12; ME. REV. STAT. tit. 5, § 4591 (Supp. 1976-77); MASS. GEN. LAWS ANN. ch. 272, § 98 (West Supp.

modations law but include sex as a protected classification. Cases brought under several of these state laws have suggested that important criteria, previously overlooked, should be considered in any analysis of the extent to which a club is truly private. The most significant of these factors to a discussion of sex discrimination in private clubs is the commercial nature of the club.

One of the first intimations of the significance of commercialism as a factor in a determination of the private club's status appeared in a case involving the Elks Club and its discriminatory practice of excluding blacks from membership.[115] Although the decision upheld the private status of the club, it made a point of addressing the issue of commercialism in private clubs. Writing for the majority, Judge Blumenfeld appended this important caveat:

> Those who believe that racial exclusion fosters fraternity are free to act out their belief, but they may not promote prejudice for profit. If a lodge were to diverge [from its social purpose] and become an establishment where economic activity was the attraction, it would cease to be exempt: To have their privacy protected, clubs must function as extensions of members' homes and not as extensions of their businesses. Racial prejudice will not be permitted to infect channels of commerce under the guise of 'privacy.'[116]

Some of the ways in which individual jurisdictions are approaching the problem of the quasi-private commercial club[117] may be seen in cases arising in New York, Pennsylvania, and California.

New York

The commercial aspect of a private club that excludes women as members was at issue in the New York case of *Kiwanis Club of Great*

1977-78); N.H. REV. STAT. ANN. § 354-A:8(IV) (Supp. 1975); N.J. STAT. ANN. § 10:1-2 (West 1976); N.M. STAT. ANN. § 4-33-7 (F) (Supp. 1975); N.Y. CIV. RIGHTS (McKinney) § 40; OR. REV. STAT. § 30.675 (1975); 43 PA. CON. STAT. ANN. 43 § 953 (Purdon) (Supp. 1977-78); UTAH CODE ANN. § 13-7-3 (Supp. 1977); W. VA. CODE § 5-11-9(f) (Supp 1976); WISC. STAT. ANN. § 942.04 (West Supp. 1977-78).

115. Cornelius v. Benevolent Protective Order of the Elks, 382 F. Supp. 1182 (D. Conn. 1974).

116. *Id.* at 1204.

117. A commercial club may be a place where businessmen congregate to transact or to facilitate the transaction of business, such as a businessman's luncheon club, a club which is actually in business, or a combination of the two. The IRS has specified the criteria that determine if a club is commercial. *See* I.R.M. HANDBOOK 23, EXEMPT ORGANIZATIONS HANDBOOK §§ 700-800 (1975); see notes 157-65 & accompanying text *infra*. The San Francisco Bar Association has proposed that a business club is "[A]ny club which is principally or substantially used by its members to entertain in connection with their business or profession or to conduct business or professional activities." Proposed Amendment to Resolution 9-6, San Francisco Bar Ass'n.

Neck, Inc. v. Board of Trustees of Kiwanis International.[118] The New York Human Rights Law that was involved provides that it is an unlawful discriminatory practice to discriminate in any place of public accommodation on the basis of race, creed, color, national origin, sex, disability, or marital status.[119]

Plaintiff in this case was a local chapter of Kiwanis that had admitted women to membership in the club in spite of the provisions of the International Constitution restricting membership to men. Once women were admitted the International's Board of Trustees revoked the local club's charter. After this action was sustained by the General Convention of the International Body in June of 1975[120] the local sued for a declaratory judgment to nullify the provisions of the Kiwanis constitution that restrict membership to men. The trial court's decision to refuse nullification was sustained by the Appellate Division.[121]

Plaintiffs sought to show that Kiwanis is not a truly private club within the meaning of the 1964 Civil Rights Act and the New York Human Rights Law and is thus subject to the proscriptions of the Acts.[122] In support of their contention plaintiffs offered to prove that Kiwanis meetings are opened by having each member state his name and firm association, that many business organizations, including banks, pay their employees' dues, and that the contacts made at meetings aid members in developing sales and other business.[123] Plaintiff's theory was that Kiwanis, far from being distinctly private, was "an organization which acts as a forum in which members seeking business and professional opportunities meet and advance their individual corporate, economic and commercial interests . . . ."[124]

The trial court compared the objectives of the Kiwanis Club set

118. 52 App. Div. 2d 906, 383 N.Y.S.2d 383 (1976) (*mem.*), *aff'g* 83 Misc. 2d 1075, 374 N.Y.S.2d 265 (1975).

119. N.Y. EXEC. LAW § 296(2)(a) (McKinney Supp. 1976-77).

120. 83 Misc. 2d at 1076, 374 N.Y.S.2d at 266.

121. 52 App. Div. 2d 906, 383 N.Y.S.2d 383.

122. Plaintiff also alleged that the discriminatory membership policies violated New York General Business Law § 340, which prohibits unlawful interference with the free exercise of activity in the conduct of any business. This argument was dismissed. 83 Misc. 2d at 1077, 374 N.Y.S.2d at 267.

123. 83 Misc. 2d at 1076-77, 374 N.Y.S.2d at 266-67. *See also* J. Shapiro's dissent noting that corporations, utilities, and banking institutions pay dues of employee members and deduct the payments. 52 App. Div. 2d at 909, 383 N.Y.S.2d at 387. The dissent quotes from a bank's statement that it paid expenses and dues for its employees to be members of service clubs: "It is important to the bank's business for its bank managers to participate in community affairs, and these activities provide significant opportunities for the cultivation of new business." *Id.* at 910, n.1, 383 N.Y.S.2d at 287. For a discussion of the legality of such dues payments, see notes 168-74 & accompanying text *infra*.

124. 52 App. Div. 2d at 906-07, 383 N.Y.S.2d at 384.

forth in the International's constitution with the criteria that cases had developed for qualification as a truly private club[125] and concluded that Kiwanis fell more to the home side of the line than to the business side of the line: "The fact that individual members may use their membership in a club to further their own business interests does not, in any way, change the avowed purposes of the organization, or convert it into a commercial club."[126]

This holding is questionable on several grounds.[127] First, the court relies in part upon the lack of commercial objectives in the constitution of Kiwanis International to support its holding that Kiwanis is truly private;[128] because the Kiwanis constitution does not recite that it is a commercial club, however, does not mean that it cannot be one. The court's argument seems to beg the question, for as Judge Shapiro observed in one portion of his lengthy dissent to the *Kiwanis* decision:

> Nothing in the stated objects of the International [constitution] indicates that it meets the standards of a purely 'private club.' To define a 'private club' as being one 'not in fact open to the public' is to allow every club to become 'private' merely by barring some small segment of the public. It is a limitation which carries within itself the seed of its own easy evasion.[129]

A second ground upon which the *Kiwanis* decision may be questioned is the court's reliance upon the holdings in the Jaycee cases.[130] In each of these cases the court upheld discriminatory charter provisions that restricted membership in the Junior Chamber of Commerce organizations to men. The *Kiwanis* court interpreted the Jaycee decisions as dispositive of the commercialism issue: "It should be noted that the Jaycees is actually a Junior Chamber of Commerce whose prime object is to further the business interests of its members. Thus, the decisions involving Jaycees are of considerable significance in the light of plaintiffs' claims of commercialism."[131] The Jaycee decisions, however, were based upon a failure to find significant state involvement with the clubs and not upon a finding that the Jaycees were centers of commercial activity. Thus, the *Kiwanis* court confuses a

125. 83 Misc. 2d at 1077, 374 N.Y.S.2d at 267. The *Kiwanis* court relied upon the criteria outlined in Wright v. Cork Club, 315 F. Supp. 1143, 1151 (S.D. Tex. 1970): "1. Concern or plan for the selection of members. 2. Standards of plan for the screening of prospective members. 3. Use of facilities primarily by members only. 4. Club members dictate the policies of the club. 5. Nonprofit and/or noncommercial purpose in the forming of the club."

126. 83 Misc. 2d at 1078, 374 N.Y.S.2d at 268.

127. *See also* J. Shapiro's dissent in 52 App. Div. 2d at 906, 383 N.Y.S.2d at 384.

128. 83 Misc. 2d at 1077, 374 N.Y.S.2d at 267.

129. 52 App. Div. 2d at 909, 383 N.Y.S.2d at 387.

130. See notes 55-71 & accompanying text *supra*.

131. 83 Misc. 2d at 1079, 374 N.Y.S.2d at 269 (citation omitted).

finding of no state action in the Jaycee cases with the separate question of whether a particular club is or is not private because it is used largely for commercial purposes. Logically, the two questions are separate issues.

Despite the result, the *Kiwanis* court implies that a private club that is primarily commercial in nature and that has a discriminatory membership policy is subject to attack. Thus, the question of a club's status as private should involve a consideration of the extent to which the club is a center of commercial activity.

Pennsylvania

One variation on the commercial theme is that a private club may lose its status as private and become a place of public accommodation because of its guest policies. This was argued in *Commonwealth, Human Relations Commission v. Loyal Order of Moose, Lodge No. 107.*[132] Because Mr. Irvis, after he was refused service by the Moose Lodge, simultaneously filed suit in federal court,[133] on the state action theory, and in state court,[134] alleging violation of the Pennsylvania Human Relations Act, the state court faced the same factual situation as was presented in *Moose Lodge.*[135] The Pennsylvania Act provides that it is an unlawful practice for a fraternal corporation or association, unless based upon membership, to discriminate on the basis of race or color.[136]

The Pennsylvania Supreme Court unanimously reversed[137] the lower court's holding that the Moose Lodge was not a place of public accommodation within the meaning of the Act. The court held that the purpose of the private club exemption clause of the statute was to protect the privacy and exclusiveness expected by the members of private clubs.[138] These interests were compromised by the club's policy of permitting any caucasian member of the public who was an

132. 448 Pa. 451, 294 A.2d 594 (1972).

133. Irvis v. Scott, 318 F. Supp. 1246 (M.D. Pa. 1970), *rev'd sub nom.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

134. 448 Pa. 451, 294 A.2d 594 (1972).

135. See notes 40-44 & accompanying text *supra.*

136. 43 PA. CON. STAT. ANN. § 955 (Purdon Supp. 1977-78), *construed in* 294 A.2d at 597. A 1969 amendment included sex as a protected classification. Amendment of July 9, 1969, Pub. L. 133, § 1.

137. 448 Pa. 451, 294 A.2d 594 (1972). After Irvis filed his complaint with the Human Relations Commission, it ordered the lodge to cease discrimination. The Court of Common Pleas, Dauphin County, No. 216 (C.D. 1969) reversed the Commission. The reversal was upheld by the Superior Court, 220 Pa. Super. 356, 286 A.2d 374 (1971). The Pennsylvania Supreme Court, 448 Pa. 451, 294 A.2d 594 (1972), unanimously reversed and held Moose Lodge could not continue its discriminatory guest practices.

138. 448 Pa. at 458-59, 294 A.2d at 597-98.

invited guest of a member, regardless of his eligibility for membership, to use the club's facilities.[139] The court found the club's policy of excluding one portion of the public under the guise of being private while simultaneously opening its doors to the rest of the public irreconcilable with a finding that the club was private within the meaning of the statute.[140]

The distinction made by the court between the lodge's discrimination as to its guest policy and as to its membership policy is an important one.[141] If Moose Lodge facilities were rented by groups for social or political functions unrelated to the private club the Pennsylvania Supreme Court would assume that the lodge was nondiscriminatory.[142] On the occasion of Mr. Irvis's visit, when the facilities were opened to members and their guests only, the court found the private club to be a place of public accommodation. Because the discriminatory activity was based upon guest policy and not upon membership policy it was prohibited.[143] Both by leasing the club's facilities and opening the club to guests the members had forfeited their rights of exclusive association and had overstepped the Act's immunity.[144]

This issue of the application of public accommodation statutes to guest and membership policies of private clubs raises at least two significant considerations for other jurisdictions.[145] The first is the extent

139. *Id.*, 294 A.2d at 598.

140. *Id.*

141. The court noted: "That is not to say that under the act the lodge may not discriminate in whatever manner it pleases in determining its qualifications for membership. Having gone beyond that point, however, and made its facilities available to nonmembers, it may not do so on a discriminatory basis in violation of the Human Relations Act." 448 Pa. at 460, 294 A.2d at 598.

142. This presumption is not always valid, as was indicated by the facts in Batavia Lodge No. 196 v. New York State Div. of Human Rights, 35 N.Y.2d 143, 316 N.E.2d 318, 359 N.Y.S.2d 25 (1974), *aff'g* 43 App. Div. 2d 807, 350 N.Y.S.2d 273 (1973). In that case a New York chapter of the Moose Lodge permitted a fashion show to be held at its facilities for invited guests. Although all guests were admitted, only caucasian guests were permitted to use the bar facilities. This discrimination was described as "blatant and intolerable." 35 N.Y.2d at 145, 316 N.E.2d at 319, 359 N.Y.S.2d at 26. The New York Supreme Court concluded that during the fashion show the club was a place of public accommodation within the meaning of the New York Human Rights Law. 43 App. Div. 2d at 810, 350 N.Y.S. at 276.

143. During the *Commonwealth* litigation the national body of the Loyal Order of Moose amended its general laws to limit guests to those who would be eligible for membership. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178 n.6 (1971); Commonwealth Human Relations Commission v. Loyal Order of Moose, Lodge No. 107, 448 Pa. 451, 294 A.2d 594, 596 n.2 (1972).

144. 448 Pa. at 458-59, 294 A.2d at 598.

145. Whether a club should lose its private status in any of the following situations depends upon the construction of the applicable state statute: if the club were

of the discrimination practiced by a particular club. For example, some clubs absolutely do not permit women in the club as guests or as members; others restrict use of the facilities by women to certain occasions, hours, or days, and to designated elevators, rooms, and stairways; finally, there are those that permit women to be brought in as guests at any time, but that do not permit women to be members in their own right.[146] Second, some consideration must be given to the federal and state law that is applicable to the club. Some states such as Pennsylvania specifically exempt membership policies of private clubs in their public accommodations statutes. In those states a private club may retain a discriminatory membership policy whereas a discriminatory guest policy may be declared unlawful. If other states do not have this limitation the same arguments and questions that arise under federal statutory law are applicable.[147]

The *Commonwealth* decision is significant first because it points out the importance of guest–membership distinctions in the analysis of state public accommodations laws. Second, the court by holding that members of a private club forfeit their freedom of association when members bring guests to the club noted that as a result of its guest policy a private club may become a place of public accommodation.

California

Another variation on the commercial theme is the theory that a private club through its activities and guest policies may become a quasi-business establishment. In California the public accommodations law is framed in terms of the commercial nature of an establishment: All persons within the jurisdiction are free and equal and are entitled to full access to all business establishments of every kind.[148]

---

open to any male guest, if it were rented to an organization whose members were all male, or if it were open to only the male members of an outside organization.

146. The weight afforded to the interest in private association will vary according to the first factor in the equation. The freedom of association arguments would appear to be the strongest in the case of a club that does not permit women in the club as members or as guests. Once women have been admitted, however, it may be argued that the members have forfeited their freedom of association because they may no longer control who comes into the club. This raises another question: If a male-only private club even once permits its facilities to be used by females have the members forfeited their first amendment freedom of association for all time?

147. Policy considerations and other factors that may be considered include: (1) What is the purpose of the club — is it a place where males go to enjoy exclusively male company or a place where business is transacted? (2) Who pays the dues — the member, or the member's employer? (3) Who are the guests — male friends, or wives and female friends, or clients? (4) Who uses the facilities — members and their guests, or disinterested groups who conduct community functions, receptions, conferences or meetings?

148. CAL. CIV. CODE § 51 (West Supp. 1977).

Although the statute's application to "all business establishments of every kind whatsoever" is uncertain,[149] a currently pending suit may test its applicability to a private club.[150] In 1974, some commissioners of the California Coastal Zone Conservation Commission, which was meeting in Eureka, were invited by a member to take an informal tour of the Ingomar Club, a local private club. A female commissioner requesting to join the tour was denied entry to the club and was informed that women are allowed on the premises only for special occasions, parties, and on Sundays. After the commissioner complained of this incident to the California Attorney General, the Attorney General sued the Ingomar Club[151] alleging that its discriminatory guest policies violate section 51 of the Unruh Civil Rights Act and that the club had become a quasi-business establishment by allowing use of its facilities for business, civic, and political functions such as meetings, banquets, and receptions.[152]

Judicial construction of statutory variations on public accommodations laws indicates commercialism is emerging as an important factor in determining the status of private clubs. The full potential of this factor as a consideration has not yet been realized and the impact of the factor of commercialism in private club litigation awaits judicial determination.

Alternative Approaches

Judicial, legislative, and individual approaches are available for alleviating unjustifiable discrimination by private clubs. Foremost in the realm of alternative approaches is the development in the judiciary of an awareness and sensitivity to the changing role of women in our society.[153] If courts are to fairly evaluate competing interests it is fundamental that the rapidly evolving status of women be appreciated.[154]

149. It is suggested that the term business establishments not only incorporates but amplifies the meaning of places of public accommodation in order to prevent psychological injury that may not occur in public view. Horowitz, *The 1959 California Equal Rights in "Business Establishments" Statute — A Problem in Statutory Application,* 33 S. CAL. L. REV. 260, 279 (1960).

150. *See* Murphy, *Men-Only Club Policy Challenged,* L.A. Times, July 2, 1974, pt. IV, at 1, col. 2.

151. People v. Ingomar Club, No. 56006 (Humboldt County, Cal. Super. Ct., 1974).

152. *Id.*

153. The district court in Rhode Island, for example, noted that "[i]t would be male chauvinistic blindness not to recognize the progress females have made during the last quarter century in their battle for equality." Women's Liberation Union of Rhode Island, Inc. v. Israel, 379 F. Supp. 44, 50 (D.R.I. 1974).

154. "To adhere to practices supported by ancient chivalristic concepts, when there may no longer exist a need or basis therefor, may only serve to isolate women

In the area of federal legislative reform numerous alternatives are available. First is the proposed equal rights amendment which would give Congress the power to legislate to end sex discrimination in the private sector.[155] A more immediate solution is the amendment of the federal public accommodations law, Title II of the 1964 Civil Rights Act, to include sex as a protected classification.[156] Such an amendment would relieve courts of the complexities of the constitutional analysis and would enable them to proceed under direct federal statutory authority to eradicate sex discrimination in private clubs that are places of public accommodation.

Private clubs may also be regulated through the federal power to tax.[157] Under existing law a private club is exempt from taxation if it is operated for "pleasure, recreation, and other nonprofitable purposes . . ."[158] and this exemption extends to social and recreational clubs supported solely by membership dues, fees, and assessments.[159]

The ostensible purpose of such a provision is to segregate those clubs that operate for recreation and pleasure from those that operate as businesses. Those that are found to operate as businesses lose their tax exempt status. A quasi-private club, which is in fact a business under the tax codes, is thus faced with the option of curtailing its public–business activities or losing its tax exempt status.

The determination of a club's tax status as private or public may have important implications for a club's status with respect to various public accommodations statutes. In a state such as California, where sex discrimination is prohibited in "business establishments," a determination that a club is a business for tax purposes should be an important consideration in determining a club's status as a business establishment. In other states, in which sex discrimination is prohibited more generally in a place of public accommodation, this same

---

from the realities of everyday life, and to perpetuate, as a matter of law, economic and sexual exploitation." Seidenberg v. McSorleys' Old Ale House, Inc., 308 F. Supp. 1253, 1260 (S.D.N.Y. 1969).

155. See note 85 *supra.*

156. Because the Civil Rights Act is supported by the power of Congress to legislate under the commerce clause, that Act could be amended to include sex along with race, color, religion, and national origin. *See generally* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). A similar amendment has been proposed for Title VI of the Civil Rights Act. H.R. 407, 95th Cong., 1st Sess. (1977).

157. *See generally* Note, *Developing Legal Vistas for the Discouragement of Private Club Discrimination,* 58 IOWA L. REV. 108 (1972).

158. I.R.C. § 501(c)(7).

159. [1976] STAND. FED. TAX REP. (CCH) ¶ 3040. No statutory definition of "club" is provided by the Internal Revenue Code, I.R.M., EXEMPT ORGANIZATIONS HANDBOOK § 721(1), but the Service has indicated that "club" implies the "existence of personal contact, commingling, and fellowship among members." *Id.*

reasoning should apply to show that a club that is a business cannot also be private.

The Tax Reform Act of 1976[160] made two significant changes in the requirements for tax exempt status for social clubs. First, "substantially all" of a club's activities must be for pleasure, recreation, and other nonprofit purposes.[161] Such an organization may earn a limited amount of income from nonmember sources and may have a limited amount of investment income.[162]

One of the guidelines used in a determination of a club's exempt status is the extent to which the club's facilities are used by the general public. Under the "minimum gross receipts standard" gross receipts from general public use of club facilities that exceed $2,500 or five percent of a club's total gross receipts may reflect the existence of a nonexempt purpose to engage in business.[163]

The effectiveness of this standard, however, is questionable because its application is dependent upon a number of assumptions that the guidelines make as to the status of nonmembers,[164] because the standard is so low, and because even if the standard is exceeded, other circumstances will be considered, such as the purpose and frequency of public use of club facilities, before a club will lose its tax exempt status.[165] Reformation of these guidelines is necessary in order to identify those clubs that purport to be private and yet receive substantial income from the public.

The second significant change in the requirement for tax exempt status of social clubs relates to discriminatory practices. A private club will lose its tax exempt status if its charter, bylaws, or any written policy statements contain a provision for discrimination against any person on the basis of race, color, or religion.[166] The reason given for this change is that the national policy dictates that it is inappropriate for a private club to be exempt from taxation if its policy is to

160. Pub. L. No. 94-455, 90 Stat. 1525 (1976).

161. [1977] STAND. FED. TAX REP. (CCH) ¶ 3041.01. Previous law required private organizations to be operated "exclusively" for these purposes. *Id.*

162. *Id.*

163. *Id.* at ¶ 3041.013.

164. Three assumptions are made:

(1) Where eight or fewer people use the club's facilities and at least one is a member, it is assumed that the nonmembers are the member's guests (and not "general public"), provided the payment for such use is by the member or his employer.

(2) Where 75% or more of a group using the facility are members, the same presumption applies where payment is by the member or his employer.

(3) In other situations, the host-guest status is not assumed and must be substantiated. *Id.*

165. *See id.*

166. *Id.* at ¶ 3041.01.

discriminate on the basis of race, color, or religion.[167] Discrimination on the basis of sex is not among the classifications that will prevent a club's achieving tax exempt status. Because there is no logical reason for its exclusion, the statute should be amended to include sex among the prohibited classifications.

Another approach to the regulation of private clubs would be in governmental control of employers' payment of private club membership dues of employees.[168] The authority for such control may come from Title VII of the Civil Rights Act,[169] which prohibits discrimination against sex in employment, or it may come from the Office of Federal Contract Compliance, which is charged with assuring equal employment opportunities without regard to sex for all persons employed with government contractors and subcontractors.[170] The question of the legality of dues payment to clubs with discriminatory membership policies has been raised with regard to banks that contract with the federal government to sell savings bonds and that act as tax collection agents.[171] The potential impact[172] in the private sector is illustrated by Bank of America's announcement that it will discontinue reimbursing executives for dues paid to all male clubs because to do so would be incompatible with its policy of being an equal opportunity employer.[173] Although regulatory power exists[174] for state control of employers who pay employees' dues in private clubs that discriminate it has yet to be exercised.

Because the service of liquor is often an important incident to a club's social activities, the grant or denial of a liquor license is viewed as a powerful state leverage device. California is attempting to capitalize on this leverage in two ways. Assembly Bill 419 introduced in

167. INTERNAL REV. ACTS, TEXT & LEGISLATIVE HISTORY 2005 (1976).

168. *See U.S. Bars Banks Paying Dues to Men-Only Clubs*, Wall St. J., April 26, 1976, at 10, col. 3; *Social Clubs Feel the Bias Squeeze*, BUSINESS WEEK, July 19, 1976, at 24; Burke, *Big Flap Over Club Memberships*, BANKING, July 1976, at 3; *Private Clubs Target for Labor Dept. Action*, INDUSTRY WEEK, Mar. 14, 1977, at 32.

169. 42 U.S.C. §§ 2000e through 2000e-17 (1970 & Supp. V 1975).

170. *See* 41 C.F.R. § 60-20.1.

171. *U.S. Bars Banks Paying Dues to Men-Only Clubs*, Wall St. J., April 26, 1976, at 10, col. 3.

172. "Since many social clubs (such as businessmen's luncheon clubs) and service clubs (such as Kiwanis and Lions) depend heavily on employer-paid dues, such a ruling would in effect give them the choice of opening their membership to women and minorities, persuading all their members to pay their own dues, or going out of business. All the major service clubs and many social clubs exclude women. A smaller number exclude minorities." *Social Clubs Feel the Bias Squeeze*, BUSINESS WEEK, July 19, 1976, at 24.

173. *Twilight Comes to the All-Male Business Club*, BUSINESS WEEK, Dec. 20, 1976, at 65.

174. See notes 169-70 & accompanying text *supra*.

February, 1977, would prohibit the issuance of a liquor license to any club that restricts membership or use of facilities on the basis of "color, race, religion, ancestry, national origin or sex."[175] Alternate draft legislation under consideration would amend the state's licensing provisions to provide disciplinary measures if clubs discriminate in guest policies with respect to business, civic, and political functions on club premises.[176]

Various local government entities have also taken steps to regulate discriminatory policies of private clubs. For example, an ordinance passed by the City of San Francisco prohibits leasing publicly owned property to clubs that have discriminatory policies.[177]

Finally, and perhaps most significantly, action by individuals, especially in the business sector, may contribute to the eradication of sex-based private club discrimination. Some large companies are beginning to question membership policies of clubs in which its executives are members.[178] Others, such as the Bank of America, have stopped reimbursing executives for membership dues in all male clubs,[179] while Transamerica Corporation, Wells Fargo Bank, and the Los Angeles County Bar Association have refused to hold meetings or events at clubs that have discriminatory policies.[180]

175. Cal. A.B. 519, Cal. Leg. Reg. Sess. 1977-78, introduced Feb. 15, 1977. The proposed legislation provides:

"(a) No license shall be issued to any club pursuant to this article if the club in any manner restricts membership or the use of its facilities on the basis of a person's color, race, religion, ancestry, national origin, or sex.

(b) No club licensed pursuant to this article shall in any manner restrict membership or the use of its facilities on the basis of a person's color, race, religion, ancestry, national origin, or sex.

(c) Violation of this section shall constitute grounds for the suspension or revocation of such license.

(d) Violation of this section shall not constitute a crime.

(e) The prohibitions of this section shall be in addition to any other prohibition established by law."

176. Copies of alternate draft legislation may be obtained from the San Francisco office of the Attorney General, Constitutional Rights Unit.

177. CITY AND COUNTY OF SAN FRANCISCO, CAL., ADMIN. CODE, ch. 12C, Ordinance No. 84-77 (1977), Nondiscrimination in Property Contracts. This ordinance prohibits discrimination on the basis of "race, color, creed, national origin, ancestry, age, sex, sexual orientation or disability. . . . " *Id.* at 1.

178. *Twilight Comes to the All-Male Business Club,* BUSINESS WEEK, Dec. 20, 1976, at 65.

179. *Id.*

180. *Id.* The Resolution adopted by the Board of Trustees of the Los Angeles County Bar Ass'n on Dec. 11, 1974, does not equivocate:

"WHEREAS, The Los Angeles County Bar Association does not have restrictive membership or guest policies based upon an individual's race, sex, religion, or national origin and does not wish to lend its support to such policies;

THEREFORE, it is resolved and affirmed that no meeting or event of the Los

Private clubs will be affected by these individual efforts to equalize access to private clubs, especially if club revenues or prestige depend upon meetings of local businesses. These individual efforts should at least result in an increased awareness by private clubs and their members of the growing national concern over the tradition of discrimination against women.

Conclusion

The woman's cause is man's. They rise or sink together; dwarfed or godlike, bond or free; if she be small, slight-natured, miserable, how shall men grow?

—*Alfred Lord Tennyson*[181]

Private clubs continue to play a significant role in the shameful tradition of discrimination against women in this country. Although many of the clubs that exclude women are genuinely private and should be protected, many are essentially public and should not be protected.

Constitutional attack upon private clubs that discriminate against women is virtually futile. Some promise of relief lies in judicial interpretation of state public accommodations statutes, but this remains to be fully explored. Various alternative approaches to be taken by the judiciary, by federal and state legislative bodies, and by individuals have been proposed, but relief awaits implementation of such proposals.

Private clubs remain an important element in every community. The exclusion of women, whether by tradition, inertia, or fear, results in their frequent isolation from participation in commercial and community activities. This isolation in turn inhibits their social, economic, and political mobility within society. This arbitrary exclusion of women from any segment of community life, simply because they are not men, is detrimental not only to women who are immediately affected but ultimately to our total society.

I. Lucretia Hollingsworth°

Angeles County Bar Association, its sections, committees or their officers shall be conducted at clubs or other facilities which discriminate on the basis of race, religion, sex or national origin."

181. *Quoted* in Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593, 606 (S.D.N.Y. 1970).

° B.A., 1969, California State University at Northridge. Member, Third Year Class. The author wishes to thank Deputy Attorney General Carole Ritts Kornblum for her assistance in the preparation of this Note.